STATE OF MICHIGAN

COURT OF APPEALS

CHEBOYGAN CEMENT PRODUCTS, INC., d/b/a GILDNER'S CEMENT PRODUCTS, Plaintiff/Counter-Defendant-Appellant/Cross-Appellee,	UNPUBLISHED May 29, 2014
v	No. 309745 Alpena Circuit Court
GLAWE, INC., and MANIGG ENTERPRISES, LTD., Defendants/Counter-Plaintiffs/Third-Party Defendants/-Appellees/Cross-Appellants,	LC No. 08-002226-CK
and CITY OF ALPENA, Third-Party Defendant/Third-Party Plaintiff-Appellee/Cross-Appellee.	

Before: BECKERING, P.J., and RONAYNE KRAUSE and BOONSTRA, JJ.

PER CURIAM.

Plaintiff, Cheboygan Cement Products, Inc., d/b/a Gildner's Cement Products, a vendor of concrete products, brought this action against defendants Glawe, Inc., and Manigg Enterprises, Ltd. (collectively referred to as "defendants" or individually by name) to recover amounts owed on three open accounts. Defendants filed a counterclaim for declaratory and other relief associated with plaintiff's supply of allegedly defective concrete, which in turn exposed defendants to potential liability from third-party defendant city of Alpena. Following a bench trial, the trial court awarded plaintiff a judgment of $51,252 with respect to its claim, but also held that plaintiff was liable to defendants for a portion of the cost of replacing defective concrete supplied for three projects in the city of Alpena. The court thereafter entered an order requiring that the city of Alpena receive and disburse monetary damages for the replacement work through an escrow account, but denied plaintiff's request for a new trial or remittitur. Plaintiff now appeal as of right and defendants cross-appeal. We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

I. BASIC FACTS AND PROCEDURAL HISTORY

Plaintiff originally filed this action in July 2008 against Glawe Equipment Company, Inc., seeking $54,506.27 based on an affidavit of "account stated" signed by its collections manager. In October 2008, plaintiff filed an amended complaint naming Glawe, Inc., and Manigg Enterprises, Ltd., as defendants. Glawe, Inc., filed a counterclaim for breach of warranties and breach of contract in connection with plaintiff's supply of allegedly defective concrete used in three projects for the city of Alpena. Glawe, Inc., alleged in its counterclaim that the city of Alpena had withheld payment of $26,464 until problems with the concrete were cured. Both defendants argued that they should not be held liable for the amount allegedly owed to plaintiff on the open accounts because the concrete supplied by plaintiff was defective, and either one or both defendants may be responsible for repairing and replacing the concrete.

Two of the projects involved years five and six of a sidewalk program initiated in approximately 2001 to install sidewalks in targeted voting precinct "sub" areas. For purposes of this opinion, we shall refer to these projects as the 2005-2006 and 2006-2007 "sub-precinct sidewalk projects." A third project, referred to as the "Fletcher Street project," involved reconstruction of the infrastructure, including the sanitary sewer and water main, and reconstruction of Fletcher Street and sidewalk replacement pursuant to a contract executed by the city of Alpena and Glawe, Inc., in July 2006. A portion of this project included colored-stenciled concrete to give the appearance of bricks, which was installed by DeRocher Masonry as a subcontractor.

In May 2009, plaintiff filed a second amended complaint seeking recovery of an increased amount of $58,441.49. At a status conference on January 4, 2010, the trial court questioned whether defendants' counterclaim was ripe for consideration, given that no third party had attempted to hold them liable for the cost of replacing any defective concrete. On January 22, 2010, defendants submitted a proposed order pursuant to the seven-day rule in MCR 2.602(B)(3) to allow both parties to add parties and amend their pleadings. On February 5, 2010, the trial court entered that order. Only defendants filed an amended pleading. In their amended counterclaim, both defendants sought declaratory and other relief against plaintiff in connection with the allegedly defective concrete. In addition, both defendants added the city of Alpena as a party for purposes of their request for declaratory relief, and Glawe, Inc., asserted a claim for breach of contract against the city to recover the $26,464 sum that was being withheld.

In March 2010, the city of Alpena filed a cross-claim against defendants for breach of contract in connection with the use of allegedly defective concrete for the city's 2005-2006 and 2006-2007 sub-precinct sidewalk projects and the Fletcher Street project.

Following a bench trial, the trial court determined that some of the concrete products supplied by plaintiff for the city of Alpena projects did not conform to contract specifications because they contained slag material.[1] The trial court found that the use of slag, in combination with other factors including the additional time needed for the concrete to cure, resulted in scaling of portions of the installed concrete, which needed to be replaced. The court held plaintiff 100 percent responsible for the replacement costs of the Fletcher Street project and 75 percent responsible for the replacement costs for the 2005-2006 and 2006-2007 sub-precinct sidewalk projects. The court later amended its findings to require the city of Alpena to receive and disburse the damages for the replacement work through an escrow account.

With respect to plaintiff's claim, the trial court determined that plaintiff was entitled to judgment against defendants in the principal amount of $51,522 for the concrete products because defendants failed to establish that a portion of the unpaid accounts related to the nonconforming concrete products. The trial court disallowed certain finance charges on the accounts sought by plaintiff.

II. PLAINTIFF'S APPEAL

A. AMENDED PLEADINGS

Plaintiff argues that the trial court abused its discretion in allowing the parties to amend their pleadings and add parties pursuant to its February 5, 2010 order. We review a trial court's decision to add or drop a party from an action for an abuse of discretion. *Hofmann v Auto Club Ins Ass'n*, 211 Mich App 55, 95; 535 NW2d 529 (1995). Whether to allow a party to amend a pleading with respect to an existing party is also reviewed for an abuse of discretion. *Decker v Rochowiak*, 287 Mich App 666, 681-682; 791 NW2d 507 (2010). "[A]n abuse of discretion occurs only when the trial court's decision is outside the range of reasonable and principled outcomes." *Saffian v Simmons*, 477 Mich 8, 12; 727 NW2d 132 (2007). Issues involving the interpretation of a court rule are reviewed de novo as questions of law. *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008).

The trial court's February 5, 2010 order indicates, on its face, that it pertained to a matter raised at a status conference on January 4, 2010, that the parties had exchanged memoranda on the matter, and that the court conducted a conference call regarding the matter on January 13, 2010. Nonetheless, the memoranda referred to by the trial court's order are not part of the lower court record and enlargement of the record on appeal is generally not permitted. See *Mich AFSCME Council 25 v Woodhaven-Brownstown Sch Dist*, 293 Mich App 143, 146; 809 NW2d 444 (2011). In addition, plaintiff has not provided a settled statement of facts for either the conference call on January 13, 2010, or the in-chambers conference that preceded the January 4, 2010, status conference. See MCR 7.210(B)(2). Despite these missing records, other portions of the record reveal the trial court's reasons for allowing defendants to proceed with their amended counterclaim.

[1] Dr. Boris Dragunsky, who testified as an expert witness at trial, described slag as a product that can sometimes be used to replace cement in concrete mixes.

At the January 4, 2010 status conference, the trial court questioned the ripeness of the damages sought by defendants for the counterclaim. In addition, the court's February 24, 2010, order denying plaintiff's motion for reconsideration of the February 5, 2010 order indicates that the court considered several factors, including the parties' theories of the case, the risk of duplicate litigation, whether amended pleadings or added parties would provide a more complete presentation of the dispute, and the fact that discovery was still ongoing. The trial court also granted defendants' ex parte motion, brought one day before entry of the February 5, 2010 order, to authorize the court clerk to issue a summons to the city of Alpena as a party upon defendants filing an amended counterclaim. In their amended counterclaim, defendants added a claim for a declaratory judgment regarding whether they had any obligation to the city of Alpena or plaintiff for the problems experienced by the city based on defective concrete. In count II, Glawe, Inc., alleged a claim for breach of contract against the city of Alpena based on its failure to pay the balance owed of $26,464 for the concrete projects. Defendants argued in their motion that the city of Alpena should be added as a necessary party pursuant to MCR 2.205. The trial court considered the added counts when addressing plaintiff's motion to strike the added counts at a hearing on April 7, 2010. The trial court found that the case "is postured well enough that all of the interested parties in this controversy, and all the relevant claims and counterclaims, are before the Court properly positioned for this Court to give one party or multiple parties the relief they're requesting or deny the relief they are requesting."

Plaintiff has not established that the trial court abused its discretion by allowing the particular amendments. Although the trial court did not cite the particular court rule on which it was relying when it entered the February 5, 2010 order, this Court will not reverse a trial court's order when the right result was reached. *Taylor v Laban*, 241 Mich App 449, 458; 616 NW2d 229 (2000).

Had plaintiff pursued a motion for summary disposition under MCR 2.116(C)(8) (failure to state a claim) or MCR 2.116(C)(10) (no genuine issue of material of fact) based on its position that defendants could not establish any damages for their counterclaim, or that the counterclaim was not yet ripe for consideration, the trial court would have been required to afford defendants an opportunity to amend their counterclaim before granting summary disposition on this basis. See MCR 2.116(I)(5). Even without a motion for summary disposition, a trial court has authority to *sua sponte* grant summary disposition in favor of a party if one of the two conditions in MCR 2.116(I)(1) are satisfied and the parties are afforded due process. *Al-Maliki v LaGrant*, 286 Mich App 483, 485; 781 NW2d 853 (2009). MCR 2.116(I)(1) provides that "[i]f the pleadings show that a party is entitled to judgment as a matter of law, or if the affidavits or other proofs show that there is no genuine issue of material fact, the court shall render judgment without delay." Here, the trial court acted consistently with MCR 2.116(I)(1) and (5) when it determined, on the basis of its concerns regarding whether the request for damages was ripe, that plaintiff and defendants should be given an opportunity to amend their pleadings. The appropriate court rule to consider in determining whether defendants should have been permitted to add a counterclaim for declaratory relief against plaintiff, or whether the added count should have been stricken when plaintiff had an opportunity to address it, is MCR 2.118.

> Under MCR 2.118(A)(2), "a party may amend a pleading only by leave of the court . . . . Leave shall be freely given when justice so requires." Trial courts have discretion to grant or deny motions for leave to amend, but leave "should

> ordinarily be denied only for particularized reasons such as undue delay, bad faith or dilatory motive, repeated failures to cure by amendments previously allowed, or futility." *In re Kostin Estate*, [278 Mich App 47, 52; 748 NW2d 583 (2008)]. In regard to undue delay, "[d]elay, alone, does not warrant denial of a motion to amend. However, a court may deny a motion to amend if the delay was in bad faith or if the opposing party suffered actual prejudice as a result." *Weymers v Khera*, 454 Mich 639, 659, 563 NW2d 647 (1997) (citation omitted). Prejudice "exists if the amendment would prevent the opposing party from receiving a fair trial, if for example, the opposing party would not be able to properly contest the matter raised in the amendment because important witnesses have died or necessary evidence has been destroyed or lost." *Id.* at 659. [*Decker*, 287 Mich App at 681-682.]

"An amendment is futile where, ignoring the substantive merits of the claim, it is legally insufficient on its face." *Gonyea v Motor Parts Fed Credit Union*, 192 Mich App 74, 78; 480 NW2d 297 (1991). With respect to a claim for declaratory relief, MCR 2.605(A)(1) provides that "[i]n a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relationships of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted."

Defendants' amended counterclaim sought a declaration that defective concrete supplied by plaintiff caused the problems experienced by the city of Alpena. Under MCR 2.605(F), "[f]urther necessary or proper relief based on a declaratory judgment may be granted, after reasonable notice and hearing, against a party whose rights have been determined by the declaratory judgment." The relief granted by the trial court may include monetary damages. *Hofmann*, 211 Mich App at 90. In other cases, it may be appropriate to determine future liability, but preclude payment until an expense is actually incurred. See *Rose v State Farm Mut Auto Ins Co*, 274 Mich App 291, 294-295; 732 NW2d 160 (2006) (discussing a declaratory judgment for future expenses under the no-fault act). But "[i]t is essential in an action for declaratory judgment that all parties having an apparent or possible interest in the subject matter be joined so that they may be guided and bound by the judgment[.]" *Allstate Ins Co v Hayes*, 442 Mich 56, 65-66; 499 NW2d 743 (1993) (internal quotation marks and citations omitted).

Plaintiff has not established that the amendment to seek declaratory relief was insufficient to establish an actual controversy between itself and defendants regarding liability for the defective concrete, or that it was prejudiced by the amendment. It was not necessary that defendants take remedial action to replace the concrete or that the city of Alpena file a lawsuit against defendants before they sought a declaration of their right to a recovery from plaintiff. A sufficient adverse interest necessitating the sharpening of the issues raised was pleaded, especially considering the allegation that the city of Alpena was withholding $26,464 of the amount owed based on the defective concrete supplied by plaintiff. See *Int'l Union, United Auto, Aerospace & Agricultural Implement Workers of America v Central Mich Univ Trustees*, 295 Mich App 486, 495; 815 NW2d 132 (2012). See also *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 372 n 20; 792 NW2d 686 (2010).

Additionally, we disagree with plaintiff's assertions that defendants acted with a dilatory motive and that it was prejudiced by the trial court's decision to permit amendment in this case.

As noted above, defendants did not seek to add a claim for declaratory relief until the issue arose concerning whether their counterclaim for damages was ripe. In addition, although plaintiff claims that defendants' motion to amend was filed on the "eve of trial," the record does not support the assertion that trial was imminent at the time of the motion. Additionally, the record reveals that plaintiff was permitted to engage in all of the necessary discovery after defendants added their claim for declaratory relief. Lastly, we disagree that plaintiff was prejudiced by the amended counterclaim. Count II of defendants' amended counterclaim merely involved a breach of contract claim against the city of Alpena based on the city's failure to pay the balance owed for concrete projects. That claim did not affect plaintiff. To the extent that plaintiff suggests that the amount of the counterclaim against it would have been limited to $26,464 if the trial court did not allow the amended pleadings, we disagree. The gravamen of a claim is determined by considering a complaint as a whole. *Adams v Adams*, 276 Mich App 704, 710-711; 742 NW2d 399 (2007). The existence of damages is an essential element of a breach of contract action, which the party asserting the breach must prove with reasonable certainty. *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003). Defendants' original counterclaim filed on October 27, 2008, sought to hold plaintiff responsible for breach of contract and related warranty claims regarding the concrete product sold for the city of Alpena sub-precinct sidewalk and Fletcher Street projects. Considered as a whole, the gravamen of the claim was that plaintiff should be liable for the entire amount necessary to cure the defective concrete. Accordingly, the trial court did not abuse its discretion when it permitted defendants to add a counterclaim for declaratory relief.

Whether the trial court should have allowed plaintiff and defendants to add parties is a distinct issue, which requires consideration of the joinder rules in MCR 2.200 *et seq*. To the extent that the parties suggest that it is necessary to make a choice between MCR 2.205 and MCR 2.207 in reviewing the propriety of the trial court's decision, we disagree because both court rules are applicable to the matter before us. See *Shouneyia v Shouneyia*, 291 Mich App 318, 324-325; 807 NW2d 48 (2011).

Although MCR 2.207 permits a court to compel the joinder of a party essential for it to provide complete relief, the trial court in this case did not compel the joinder of any party. Rather, the trial court afforded plaintiff and defendants an opportunity to add parties "as they see fit." Nonetheless, the standard for a court to compel joinder in MCR 2.207(A) is essentially the same as MCR 2.205(A), which provides for necessary joinder of "persons having such interests in the subject matter of an action that their presence in the action is essential to permit the court to render complete relief . . . ." Because defendants' amended counterclaim was based on MCR 2.205, it is immaterial whether the trial court acted *sua sponte* or pursuant to a motion to add the city of Alpena for purposes of the declaratory judgment count in the amended counterclaim. The material question is whether the city of Alpena's presence was essential for the court to grant complete relief. Additionally, because defendants were seeking declaratory relief, it was necessary that there be an actual controversy between the city of Alpena and defendants. See *Hofmann*, 211 Mich App at 97.

There is merit to plaintiff's argument that the city of Alpena's presence was not strictly necessary to determine the rights and obligations that existed between itself and defendants. But we reject plaintiff's position that the city of Alpena's presence was unnecessary to grant complete relief because the city clearly had an interest in the defective concrete that was the

basis for defendants' counterclaim that plaintiff should be ultimately responsible for any replacement costs. Apart from the need to identify the particular locations of defective concrete within the city and to bind the city to that decision, the city's presence became essential when plaintiff filed an affirmative defense to the amended counterclaim in which it asserted that the defects in the concrete were proximately caused, or contributed to, by others. In sum, because the record presented to the trial court at the time it denied the motion to strike indicated that defendants had adverse interests to both plaintiff and the city of Alpena, which necessitated the sharpening of the issues raised in count I of the amended counterclaim, and that the city's presence was necessary for the trial court to grant complete relief, the trial court's decision to permit defendants to add the city of Alpena was not an abuse of discretion.

B. LIMITATION ON REMEDIES

Plaintiff also argues that the trial court erred by not limiting damages for the 2005-2006 and 2006-2007 sub-precinct sidewalk projects and the Fletcher Street project to the purchase price of the concrete, based on the trial court's finding that the parties had a contract that was established by their exchange of purchase orders and invoices. Plaintiff argues that delivery slips that accompanied deliveries of the concrete were the invoices on which the trial court relied to find the existence of a contract, and that these documents contained binding limitation-of-remedies provisions.[2]

"This Court reviews a trial court's findings of fact following a bench trial for clear error and reviews de novo the trial court's conclusions of law." *Redmond v Van Buren Co*, 293 Mich App 344, 352; 819 NW2d 912 (2011). A finding is clearly erroneous if it lacks evidentiary support or we are left with a definite and firm conviction that a mistake was made. *Chelsea Investment Group, LLC v City of Chelsea*, 288 Mich App 239, 251; 792 NW2d 781 (2010). Deference is given to the trial court's special opportunity to judge the credibility of the witnesses who appeared before it. MCR 2.613(C).

A trial court is required to state its findings and conclusions on the record or in a written opinion. MCR 2.517(A)(3). "Brief, definite, and pertinent findings and conclusions on the contested matters are sufficient, without over-elaboration of detail or particularization of facts." MCR 2.517(A)(2). A court's findings are sufficient where "it appears that the trial court was aware of the issues in the case and correctly applied the law, and where appellate review would not be facilitated by requiring further explanation." *Triple E Produce Corp v Mastronardi Produce, Ltd*, 209 Mich App 165, 176; 530 NW2d 772 (1995).

Addressing first the contracts for the 2005-2006 and 2006-2007 sub-precinct sidewalk projects, the record discloses that the trial court used, pursuant to Article 2 of the Uniform Commercial Code (UCC), MCL 440.2101 *et seq.*, purchase orders and invoices that plaintiff and

[2] The record does not support defendants' contention that this issue was decided by the trial court in a pretrial ruling on a motion for summary disposition.

defendants exchanged to establish a contract.[3] Specifically, the court considered that purchase order no. CC-0574-01, dated August 15, 2005, specified the grade of cement that defendants claimed should have been provided. This purchase order identifies the purchaser as Commercial Concrete,[4] contains the description "MDOT S3 3000 PSI Mix" in a quantity "As Needed," and specifies a unit price of $67.45. A number of other conditions are listed on the second page, including a requirement that the concrete meet contract specifications unless otherwise specified, and that

> THIS ORDER SHALL BECOME BINDING ON BOTH PARTIES UNLESS IT IS MODIFIED OR CANCELLED BY EITHER PARTY IN WRITING WITHIN 7 CALENDAR DAYS FROM THE DATE APPEARING AT THE TOP OF THIS ORDER NEXT TO TODAY'S DATE.

Concerning the "invoices" the trial court used to find a binding contract, even without a signature, it is not clear that the court's reference to "invoices" intended to refer to plaintiff's billing invoices or its delivery slips for the concrete. The record indicates that plaintiff generated two different forms that could be characterized as invoices, one of which was handwritten and was also used as a delivery slip. The other one was a computer-generated document that, according to plaintiff's office manager, Catherine Gildner, was sent out with the monthly statement. The limitation-of-remedies provision plaintiff cites was on the back side of the handwritten form, and provided as follows:

> The Purchaser's exceptions and claims shall be deemed waived unless made in writing 3 days from time of delivery. The Seller shall be given full opportunity to investigate them. The Seller's liability shall in no event exceed the purchase price of the materials against which the claim is made.

It is clear from the parties' closing arguments at trial and from their proposed findings of fact submitted to the trial court that they disputed whether the limitation-of-remedies provision in the delivery slips became part of the contracts under the UCC. It is also apparent from the trial court's summary denial of plaintiff's postjudgment motion for a new trial, remittitur, and amended findings on this issue, that the court did not find the limitations-of-remedies provision to be part of the contracts. Although the trial court did not specifically address the limitations-of-remedies provision in the delivery slips, we conclude that remand for further factual findings regarding this issue is unnecessary because, as discussed *infra*, it can be determined as a matter of law that the limitation-of-remedies provision in the delivery slips did not become part of the parties' contract under the UCC.

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[3] A contract may be established through a course of dealings that includes a pattern of exchanging purchase orders and invoices, regardless of whether the invoices and purchase orders contained signatures. See *Rood v Gen Dynamics Corp*, 444 Mich 107, 117 n 17; 507 NW2d 591 (1993).

[4] Glawe Inc. was d/b/a "Commercial Concrete."

As defendants' point out, MCL 440.2204(1) provides that "[a] contract for the sale of goods may be in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract," and MCL 400.2204(2) provides that "[a]n agreement sufficient to constitute a contract for sale may be found even though the moment of its making is undetermined." But the material issue before us is not whether there were contracts for plaintiff to deliver concrete for the 2005-2006 and 2006-2007 sub-precinct sidewalk projects, but rather the terms of those contracts. This requires consideration of what constituted the offer and acceptance of the contract terms. MCL 440.2206(1) provides:

> (1) Unless otherwise unambiguously indicated by the language or circumstances
>
> (a) an offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances;
>
> (b) an order or other offer to buy goods for prompt or current shipment shall be construed as inviting acceptance either by a prompt promise to ship or by the prompt or current shipment of conforming or nonconforming goods, but such a shipment of nonconforming goods does not constitute an acceptance if the seller seasonably notifies the buyer that the shipment is offered only as an accommodation to the buyer.

MCL 440.2207 addresses the existence of additional or different terms in an acceptance or a contract formed by conduct. The statute provides:

> (1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.
>
> (2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:
>
> (a) the offer expressly limits acceptance to the terms of the offer;
>
> (b) they materially alter it; or
>
> (c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.
>
> (3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this act.

Contrary to defendants' argument on appeal, these provisions did not abrogate the common-law "mirror-image" rule. As explained in *Challenge Machinery Co v Mattison*

Machine Works, 138 Mich App 15, 22; 359 NW2d 232 (1984), the UCC merely alters the rule where documents form the basis of the offer and acceptance:

> At common law, the failure of the responding document to mirror the terms of the offer would have precluded the formation of a contract. The UCC, however, altered this "mirror-image" rule by providing that the inclusion of additional or different terms would not prevent the acceptance from being operative unless the acceptance was made conditional on the assent of the other party to those additional or different terms. MCL 440.2207(1)[.]

In *Challenge Machinery Co*, 138 Mich App at 18-22, the potential buyer responded to a seller's written price quote for a grinder by sending a purchase order that contained different provisions from the proposal. This Court determined that the price quote was the offer, based on standardized forms used by the parties and other circumstances surrounding the parties' negotiations, and that the purchase order was a "definite and seasonal expression of acceptance" under MCL 440.2207(1) because the acceptance was not conditioned on the seller's assent to the different terms. *Id.* at 22. Thus, the writings of the parties established a contract. *Id*. The different terms proposed by the buyer included warranty and indemnification provisions. *Id.* at 19. The seller's price quotation, by contrast, limited its liability. *Id*. This Court found that the "conflicting provisions of the forms did cancel each other out and did not become a part of the contract." *Id*. at 23. Thus, the seller's limitation of liability provision was found to be unenforceable because it was not agreed to by the parties. *Id.* at 26. "[T]he reason for discarding the conflicting provisions is that it is assumed that each party objected to the other's contrary clause." *Id*.

This case differs from *Challenge Machinery Co* because the trial court treated the purchase orders as offers, and neither party on appeal disputes that determination. A purchase order may constitute an offer to purchase. *Aaron E Levine & Co v Calkraft Paper Co*, 429 F Supp 1039, 1048 (ED Mich, 1976).[5] The purchase orders in this case were in the nature of blanket purchase orders because they specified the possible quantity requirements for the sidewalk projects, namely "as needed," the price, and other terms. The actual quantity for each purchase order was established as verbal orders were placed for concrete products and plaintiff made deliveries to the job sites and left the delivery slips. As indicated earlier, it is unclear whether the trial court considered these delivery slips to be "invoices." But because the delivery slips were not conditioned on assent to any additional terms, the course of performance was sufficient to establish a binding contract in the nature of a blanket purchase order.

Assuming for purpose of review that the trial court properly treated the parties as merchants, an assumption that the parties do not challenge on appeal, any additional terms constitute proposals under MCL 440.2207(2)(b) unless they would materially alter the contract. The official comments to UCC provisions, while lacking the force of law, can be a useful tool in

[5] When interpreting a uniform act such as the UCC, "[w]e [ ] find it appropriate to seek guidance from the decisions of other jurisdictions." *Power Press Sales Co v MSI Battle Creek Stamping*, 238 Mich App 173, 180; 604 NW2d 772 (1999).

our analysis as to what constitutes a term that would materially alter the contract. See, generally, *Shurlow v Bonthuis*, 456 Mich 730, 735 n 7; 576 NW2d 159 (1998). The official comments for MCL 440.2207(2)(b) provide, in pertinent part:

> 3. Whether or not additional or different terms will become part of the agreement depends upon the provisions of subsection (2). If they are such as materially to alter the original bargain, they will not be included unless expressly agreed to by the other party. If, however, they are terms which would not so change the bargain they will be incorporated unless notice of objection to them has already been given or is given within a reasonable time.
>
> 4. Examples of typical clauses which would normally "materially alter" the contract and so result in *surprise or hardship* if incorporated without express awareness by the other party are: *a clause negating such standard warranties as that of merchantability or fitness for a particular purpose in circumstances in which either warranty normally attaches*; a clause requiring a guaranty of 90% or 100% deliveries in a case such as a contract by cannery, where the usage of the trade allows greater quantity leeways; a clause reserving to the seller the power to cancel upon the buyer's failure to meet any invoice when due; a clause requiring that complaints be made in a time materially shorter than customary or reasonable.
>
> 5. Examples of clauses which involve no element of *unreasonable surprise* and which therefore are to be incorporated in the contract unless notice of objection is seasonably given are: a clause setting forth and perhaps enlarging slightly upon the seller's exemption due to supervening causes beyond his control, similar to those covered by the provision of this Article on merchant's excuse by failure of presupposed conditions or a clause fixing in advance any reasonable formula of proration under such circumstances; a clause fixing a reasonable time for complaints within customary limits, or in the case of a purchase for sub-sale, providing for inspection by the sub-purchaser; a clause providing for interest on overdue invoices or fixing the seller's standard credit terms where they are within the range of trade practice and do not limit any credit bargained for; *a clause limiting the right of rejection for defects which fall within the customary trade tolerances for acceptance "with adjustment" or otherwise limiting remedy in a reasonable manner (see Sections 2-718 and 2-719).* [Emphasis added.]

We conclude that MCL 440.2207(2)(b) controls the outcome of this issue. Further, we agree with the United States Court of Appeals for the Eighth Circuit in *Marvin Lumber & Cedar Co v PPG Indus, Inc*, 401 F3d 901, 911 (CA 8, 2005), that either hardship or surprise is an appropriate criterion for finding a material alteration under MCL 440.2207(2)(b). In this case, the record supports the trial court's finding that the contracting parties' "method of communicating the terms and conditions of the purchase and delivery of concrete was cursory at best." Essentially, the evidence to evaluate the surprise criterion for a material alteration consists of boilerplate language in small print on the back side of delivery slips, which fails to expressly address warranties and, unlike other provisions on the back side of the delivery slips, does not use bold print. Standing alone, this evidence might be insufficient to conclude, without further

findings by the trial court, that giving effect to the limitation-of-remedies provision would constitute a material alteration of the contract. Cf. *id.*

However, it is clear that a three-day period for a purchaser to make "exceptions and claims" after a delivery is insufficient to discover the consequences of using a mixture of concrete that includes slag, thereby working a hardship that would materially alter the contract. The trial court found that the concrete plaintiff supplied was defective and that exposure to environment stresses, such as road salt and frequent traffic, resulted in the manifestation of the scaling that required replacement. By limiting the time period for identifying "exceptions and claims" to three days and the remedy to the price of materials, which were incapable of being returned for a refund, the limitation-of-remedies provision essentially shifts the entire risk of repair or replacement work for defective concrete to defendants. Ordinarily, the UCC would provide warranties of merchantability and fitness, see MCL 440.2314 and 440.2315, that would protect defendants against defects contained in plaintiff's concrete such as the one identified by the trial court in the case at bar. However, if the limitation-of-remedies provision applied, such warranties would not apply, and defendants would be required to bear the entire risk of repair or replacement. Given these circumstances, further findings by the trial court are unnecessary to conclude that giving effect to the limitation-of-remedies provision would materially alter the contracts, including the implied warranties that would otherwise be available to the purchaser, for the sub-precinct sidewalk projects. See *Marvin Lumber & Cedar Co*, 401 F3d at 912 (finding a hardship that would materially alter the contract where the limitation-of-remedies provision required one party to bear the brunt of the cost to replace a product supplied by the other party if the product failed in the future). As a matter of law, the limitation-of-remedies provision in the delivery slips did not become part of the contracts. See MCL 440.2207(2)(b).

We note that the Fletcher Street project differs from the sub-precinct sidewalk projects because there was evidence that a subcontractor, DeRocher Masonry, did the colored-stenciled concrete work. But plaintiff's argument fails for the same reasons as its claim with respect to the sub-precinct sidewalk projects. Accordingly, we find no error in the trial court's failure to apply the limitations-of-remedies provision in the delivery slips when determining damages.

C. FLETCHER STREET PROJECT

Next, plaintiff raises three issues concerning the trial court's finding that it was responsible for 100 percent of the costs of replacing certain sections of defective concrete for the Fletcher Street project.

With respect to the colored-stenciled concrete finished by DeRocher Masonry, a subcontractor, plaintiff's sole claim is that the trial court erred in finding it completely liable for the replacement costs because DeRocher Masonry was aware that the concrete mixture contained slag. We disagree. Although plaintiff's operation's manager offered testimony that might support a finding that the owner of DeRocher Masonry was told something regarding plaintiff's use of slag in 2005, the trial court was not obliged to credit that testimony, even if it was not contradicted. *Guerrero v Smith*, 280 Mich App 647, 669; 761 NW2d 723 (2008). In any event, the city of Alpena's contract for the Fletcher Street project was not even entered into until July 2006. Further, as the trial court determined, the Fletcher Street project required different grades of concrete than the sub-precinct sidewalk projects. The trial court's concern in allocating fault

for defective concrete between plaintiff and defendants was whether contractors had actual notice that the concrete mixture for the specific city projects contained slag, or had notice from the handling of the concrete to trigger further inquiry regarding whether it should be finished differently. Examined in this context, the trial court's finding that the record was devoid of evidence that DeRocher Masonry had actual notice that the concrete mixture for the Fletcher Street project contained slag is not clearly erroneous. *Chelsea Investment Group, LLC*, 288 Mich App at 251. Considered in light of the trial court's additional finding that there was no evidence that DeRocher Masonry had inquiry notice after handling the concrete, we find no basis for disturbing the trial court's allocation of 100 percent of the fault for the defective colored-stenciled concrete on the Fletcher Street project to plaintiff.

With respect to the gray concrete used for the Fletcher Street project, plaintiff argues that the trial court erred in finding it completely liable to defendants for the replacement costs because defendants, and not DeRocher Masonry, were responsible for installing the gray concrete. Plaintiff argues that, at a minimum, defendants should have been allocated the same percentage of fault, 25 percent, determined by the trial court for the sub-precinct sidewalk projects. Plaintiff arrives at this amount by noting the fact that the trial court allocated 25 percent of the cost of replacement for the sub-precinct sidewalk projects to defendants upon a finding that defendants had an obligation to inquire as to the quality of the concrete supplied by plaintiff after Michael Ryan, a foreman for Commercial Concrete noticed that the concrete supplied for that project was "grittier" and more difficult to finish. The trial court determined that Ryan's knowledge obligated defendants to inquire as to the reason why the concrete was "grittier," but that plaintiff had a greater obligation to inform defendants of the decision to sell concrete with slag mixed in. Thus, for the sub-precinct sidewalk projects, the trial court assigned 25 percent of the fault to defendants and 75 percent to plaintiff. With regard to the Fletcher Street project, Plaintiff argues that the trial court clearly erred by concluding that DeRocher was solely responsible for working on the Fletcher Street Project, that the evidence showed that defendants installed the gray concrete for the Fletcher Street Project, and that the same 75/25 apportionment of fault should have been applied to the work defendants performed on the Fletcher Street project.

While the trial court correctly recognized that DeRocher finished the stenciled concrete on the Fletcher Street project, we agree with plaintiff that the trial court failed to account for the fact that defendants also worked on the project. The record reveals that defendants finished the gray concrete for the Fletcher Street project. During trial on July 28, 2010, plaintiff's counsel had the following exchange with Ryan regarding the Fletcher Street project:

> *Q.* You were responsible for finishing the gray concrete on Fletcher Street, correct?
>
> *A.* Yes.
>
> *Q.* Did you use curing compound on Fletcher Street?
>
> *A.* Yes.

Because the trial court failed to recognize that defendants were involved in handling a portion of the Fletcher Street project, we find that the trial court clearly erred in this respect. Accordingly, we remand with instructions for the trial court to consider whether defendants' obligation to inquire with regard to concrete used on the sub-precinct project, which occurred before the Fletcher Street project, should have extended to the concrete that was used on the Fletcher Street project. If so, the trial court may choose to allocate to defendant 25 percent of the replacement costs of the gray concrete work.

Plaintiff also argues that the trial court erred by failing to exclude concrete, which had been supplied by L&S Concrete and installed by Zann Brothers Construction, Inc., from its liability for replacement costs associated with the Fletcher Street project. The trial court did not specifically address testimony that gray concrete supplied by L&S Concrete was used around two manhole covers at the intersection of Fletcher Street and Second Avenue, a section that the trial court ordered to be replaced. However, plaintiff did not raise this issue before the trial court. Instead, it argued that if both its concrete and L&S's concrete, which allegedly did not contain slag, needed to be replaced, it was inaccurate to fault the slag in plaintiff's concrete for the failure of the concrete. Plaintiff never argued that the trial court should exclude the L&S concrete from the amount that needed to be replaced, nor did plaintiff provide any facts concerning the area covered by the L&S concrete. Because this issue is unpreserved, and because plaintiff failed to present any facts with regard to the amount of concrete that should have allegedly been excluded from the total amount that needs to be replaced with regard to the Fletcher Street Project, we decline to consider this issue. *Vushaj v Farm Bureau Gen Ins Co*, 284 Mich App 513, 519; 773 NW2d 758 (2009).

D. SUB-PRECINCT SIDEWALK PROJECTS

Plaintiff lastly argues that the trial court erred in determining the damages for the 2005-2006 and 2006-2007 sub-precinct sidewalk projects when it calculated the cost per square foot of replacing four-inch and six-inch sections of the defective concrete. We disagree.

In determining the allowable cost for the replacement work, the trial court contemplated that defendants would perform the replacement work.[6] The trial evidence regarding the costs of this replacement work included Glawe, Inc.'s "bid unit" prices, which had a markup for overhead and profit totaling approximately 17 percent, of $5.07 and $6.20 a square foot for the four-inch and six-inch sections, respectively.[7] The trial court also received estimates, based on the city of Alpena's current contracts for other projects that did involve defendants, of $3.28 a square foot for four-inch sections and $3.66 a square foot for six-inch sections. The trial court's finding that a fair unit price for the replacement work would be $4.00 a square foot for the four-

[6] Although the trial court also anticipated that the most likely time for the replacement work to be performed would be between April and October 2011, the judgment was not entered until October 2011. Further, there is no indication in the record that any replacement work was actually performed by defendants in 2011.

[7] Without a 17 percent markup for overhead and profit, the figures would be $4.20 and $5.39.

inch sections and $4.25 a square foot for the six-inch sections is within the range of the submitted evidence. Accordingly, we find no clear error. *Triple E Produce Corp*, 209 Mich App at 177.

Plaintiff's reliance on evidence offered in support of its posttrial motions for new trial, remittitur, and amended findings to challenge the trial court's findings at trial is procedurally deficient because plaintiff failed to include a challenge to the trial court's denial of its postjudgment motion in its statement of questions presented, as required by MCR 7.215(C)(5), and plaintiff does not address the merits of its postjudgment motion in its brief. *Botsford Continuing Care Corp v Intelistaf Healthcare, Inc*, 292 Mich App 51, 66; 807 NW2d 354 (2011); *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999). Plaintiff's cursory argument regarding its postjudgment motion in its reply brief is insufficient to remedy the deficiencies in its principal brief. *Blazer Foods, Inc v Restaurant Props, Inc*, 259 Mich App 241, 252; 673 NW2d 805 (2003). Moreover, this evidence would not change our conclusion that the trial court's award of replacement costs was not clearly erroneous. Accordingly, we reject this claim of error.[8]

III. DEFENDANTS' CROSS-APPEAL

A. LITIGANT MISCONDUCT

Defendants argue that the trial court erred in denying their posttrial motion for a sanction of default or dismissal against plaintiff for alleged perjury by its operations manager in a deposition shortly before trial. Defendants contend that these sanctions were warranted for litigant misconduct, and that MCR 2.603, MCR 2.504(B)(1), or MCR 2.313(B)(2)(c) authorized the trial court to impose these sanctions.

Defendants' reliance on MCR 2.603 is misplaced because defendants did not seek a default sanction for a violation of the court rules. And while this Court noted in *Wilhelm v Mustafa*, 243 Mich App 478, 484 n 3; 624 NW2d 435 (2000), that the authority to default a party under MCR 2.603(A) is coextensive with a court's power of dismissal under MCR 2.504(B), defendants have not established that either court rule governs their request in this case. Likewise, because defendants' claim is not based on a violation of a discovery order, MCR 2.313(B)(2)(c) is also inapplicable. *KBD & Assoc, Inc v Great Lakes Foam Technologies, Inc*, 295 Mich App 666, 677; 816 NW2d 464 (2012).

Therefore, we limit our review to whether the trial court should have exercised its inherent authority to sanction litigant misconduct. *Cummings v Wayne Co*, 210 Mich App 249, 253; 533 NW2d 13 (1995). We review a trial court's exercise of its inherent power for a clear abuse of discretion. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006);

[8] Lastly, we note that with regard to all of its arguments relating to damages, plaintiff repeats its claim that the trial court erred by failing to honor the limitation-of-remedies provision contained in its delivery slips. Having rejected this claim, we need not reconsider it each time plaintiff raises the issue.

Brenner v Kolk, 226 Mich App 149, 160; 573 NW2d 65 (1997). The trial court's findings of fact are reviewed for clear error. MCR 2.613(C); *Redmond*, 293 Mich App at 352.

Perjury may constitute a form of intrinsic fraud in obtaining a judgment, but does not prevent an adversarial trial because the litigant confronted with perjured testimony may rebut it through the litigant's own case. *Rogoski v Muskegon*, 107 Mich App 730, 736-737; 309 NW2d 718 (1981). The statutory crime of perjury requires proof of a willful false statement under oath regarding any matter or thing. MCL 750.423(1); *People v Lively*, 470 Mich 248, 253-254; 680 NW2d 878 (2004).

Defendants claim of litigant misconduct is based on an admission at trial by plaintiff's operations manager that he "lied" in his earlier deposition regarding his receipt of an unsigned purchase order for the Fletcher Street project, dated June 30, 2006, which was shown to him by defendants' counsel. Defendants argue that, considered in context, the trial court erred in finding that plaintiff's operations manager did not admit to perjury. We disagree.

The record reveals that during his deposition, which was less than two weeks before trial, plaintiff's operations manager was shown several purchase orders, including an unsigned purchase order dated June 30, 2006, and was asked whether he received the purchase order on the date listed on the purchase order. At the deposition, the operations manager testified, "I would say that had to have been relatively close." During trial, the operations manager explained his typical procedures regarding purchase orders, and testified that he did not always receive a written purchase order. Defense counsel then asked the operations manager if he had seen the unsigned purchase order about which he had been questioned during his deposition. The operations manager testified that he had not seen the purchase order before his deposition. Defendants' trial counsel then asked the operations manager whether his deposition testimony regarding the purchase order was true, or whether his trial testimony was true. This prompted the following exchange:

> *Q.* So I'm asking you, you were under oath in your deposition, you're under oath here today. Which testimony are we to believe?
>
> *A.* I'm going to have to ask you to believe what I'm saying today. What was going on there, and I knew I had signed some documents. Obviously a couple hours into the deposition or whatever, if I wasn't miss—when I'm looking at these things they looked familiar to me. I've seen purchase orders before. After that, I have been looking through a lot of my old stuff and I found correspondences between me and Michael Ryan pursuant—the pricing and what classes of concrete he wanted for this job, and I had made an assumption then. What I'm saying what I see today is not what I seen.
>
> *Q.* So you're saying that not quite two weeks ago when you were under oath you were lying?
>
> *A.* I have to say that.

Thereafter, defense counsel asked the operations manager about his deposition testimony wherein counsel asked the operations manager whether he signed the purchase order at issue, and

the operations manager testified, "I would have had to." Defense counsel asked the operations manager whether his deposition testimony regarding the signature was also a lie. To this inquiry, the operations manager responded: "I know what you're asking me, and what I'm saying is truthful in the fact that I would have signed it. If I had it, I would have signed it."

During his continued examination the next day, the operations manager offered the following testimony to explain the difference between his trial testimony and his deposition testimony with regard to the purchase order:

> Uh, well, sitting there for several hours [at my deposition] and listening to [counsel] grill me question after question[], I made the assumption that I had these specific purchase orders. My signatures were on several before that, and I just kind of drug them in the same pattern. It is—the format is familiar to me, it was unlikely that I wouldn't have had them, but my signatures wasn't [sic] on them, and I don't know how—I went through boxes of my stuff and I don't have a copy of it so—

Examining the underlying trial testimony in context, the record amply supports the trial court's finding that the witness did not admit to intentionally offering false testimony in his deposition, but rather made an "admission" at trial that he had lied "for the sake of argument in the sense of 'if you say so.'" Further, the trial court was in the best position to evaluate the witness's trial testimony. "The credibility of a witness is determined by more than words and includes tonal quality, volume, speech patterns, and demeanor, all giving clues to the factfinder regarding whether a witness is telling the truth." *People v Lemmon*, 456 Mich 625, 646; 576 NW2d 129 (1998). Giving deference to the trial court's assessment of the trial testimony, we find no clear err in its decision rejecting defendants' claim of perjury. Accordingly, the trial court did not abuse its discretion when it declined to sanction plaintiff.

B. MANIGG ENTERPRISES, LTD.

Although defendants next argue that the trial court erred in denying Manigg Enterprises, Ltd.'s motion for summary disposition under MCR 2.116(C)(8) and (10), defendants do not address the basis for the trial court's decision, which was that dismissal of Manigg Enterprises, Ltd., was not warranted because defendants previously stipulated that Manigg Enterprises, Ltd., could be named as a defendant in this case. An appellant's failure to brief the basis for a trial court's decision precludes appellate relief. *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 381; 689 NW2d 145 (2004), *Roberts & Son Contracting, Inc v North Oakland Dev Corp*, 163 Mich App 109, 113; 413 NW2d 744 (1987). Regardless, given that defendants expressly stipulated that Manigg could be added as a defendant and that the record reveals that Manigg was named on purchase orders, defendants have not demonstrated that the trial court erred in denying the motion.

C. FINANCE CHARGES

Defendants lastly argue that the trial court erred in allowing plaintiff to collect interest on the open accounts. While we do not fully agree with defendants' argument, having reviewed the trial court's findings of fact for clear error and its conclusions of law de novo, we conclude that

the trial court committed error requiring reversal in its determination of the amount to be awarded to plaintiff for its collection action. *Redmond*, 293 Mich App at 352.

In its October 13, 2010 opinion and order, the trial court stated its intention to award plaintiff damages for the unpaid "principal amount" of the "products sold" to defendants for which defendants did not pay. Based on plaintiff's representations at trial, the trial court determined that this amount was $51,252. Although plaintiff sought recovery of an additional $7,189 for finance charges that had accrued on defendants' accounts between September of 2007, the date on which defendants refused to pay for the concrete and plaintiff demanded payment, and November of 2008, the trial court denied this amount. The trial court found that defendants had a right to refuse payment during this time period because the concrete supplied by plaintiff was defective. Thus, the trial court awarded plaintiff $51,252.

The trial court concluded that $51,252 represented plaintiff's damages for the "principal amount" of "products sold" to defendants based on Plaintiff's Exhibits 11-13, which plaintiff alleged showed defendants' outstanding balance on three accounts, "GLA 400," "COM 500," and "COM 800." As defendants note on appeal, the balance presented in Plaintiff's Exhibits 11-13 included not only the amount defendants owed plaintiff for the "products sold," but it also included finance charges on payments that were overdue. As illustrated by Plaintiff's Exhibits 14-16, the balance for GLA 400, COM 500, and COM 800 included thousands of dollars worth of finance charges as well as charges for the "products sold." As noted above, the trial court expressly excluded some of these finance charges, including all of the finance charges for COM 800, but did not exclude any finance charges between December of 2006, when plaintiff began assessing finance charges, and September of 2007. It is not apparent from the trial court's opinion and order whether the trial court intended to award plaintiff damages for the finance charges in addition to damages for the "products sold." Additionally, the trial court's opinion and order did not make a finding as to whether the finance charges were to be included in the "principal" amount for "products sold."

At trial, the parties disputed whether the finance charges became part of the agreement between the parties. Plaintiff's delivery slips included a provision stating that "A 1 ½% FINANCE CHARGE (18% ANNUALLY) WILL BE ADDED TO ALL PAST DUE ACCOUNTS[.]" Plaintiff presented testimony from Catherine Gildner, who managed plaintiff's office and performed bookkeeping functions, that in approximately 20 years of doing business with defendants, plaintiff never sought to enforce the finance charge provision. However, in either December of 2006 or January of 2007, Catherine testified that she informed defendants of her intent to add the finance charges to defendants' outstanding balances with plaintiff. Jeffery Mudroch, Glawe Inc.'s general manager, denied that he agreed to pay finance charges. In its October 13, 2010 opinion and order, the trial court did not make a finding with regard to whether the finance charges became part of the parties' agreement.

Thus, we are left with a damage amount, $51,252, that includes finance charges, but the record does not include a finding by the trial court as to whether the finance charges were part of the parties' agreement. The trial court's October 13, 2010 opinion and order appears to award damages solely for the "principal amount" on "products sold," suggesting that the trial court did not anticipate finance charges, but the amount awarded includes thousands of dollars in finance charges. Accordingly, we remand with instructions for the trial court to decide whether the

provision for finance charges was part of the parties' agreement, whether it be pursuant to the delivery slips, the parties' course of conduct, or otherwise, and whether the award of damages should include finance charges.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Jane M. Beckering
/s/ Amy Ronayne Krause
/s/ Mark T. Boonstra